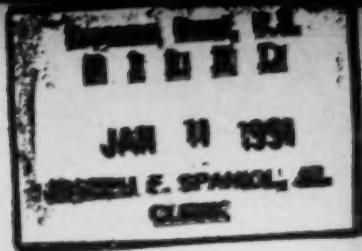


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No. 90-950

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

STATE OF MISSOURI EX REL. PAUL BEHLE, et al.
EXCEPTIONS OF DONALD E. ROTH

Petitioner,

vs.

THE HONORABLE HARRY STUSSIE
Respondent.

**BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI**

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QUESTION PRESENTED

"May the Supreme Court of Missouri legislatively change substantive statutory rights under its rule making authority?"

This is the question posed by Petitioner which is effectively asking the Federal Court to interpret the relationship of a state court and the state legislature based on that state's constitution. Respondent would suggest that such an issue is beyond the scope of this Court and that the appropriate arena for interpretation of a state's constitution is only by that state's judiciary.

The issue as it should be presented is:

Has the Supreme Court of Missouri legislatively changed substantive statutory rights under its rule making authority?

The Missouri Supreme Court Rule 86.06 provides in pertinent part:

. . . upon failure to pay the assessment aforesaid, within ten (10) days after it becomes final, . . . the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by *execution*, . . . [emphasis added].

The Missouri Revised Statute Section 523.040 provides in part:

. . . and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution.

The Missouri Supreme Court has taken the position based on the rule that it is not within its judicial authority to interfere and enforce payment through execution on the condemning authority until the assessment is final. In reality, if the courts acted within the manner suggested by Petitioner, such actions would constitute a breach in the separation of powers doctrine. Petitioner suggests that courts should enforce payment of the commissioner's award before the trial on the exceptions even if there has been no taking. Such an action by the courts would be equal to committing a legislative function as payment of the award by the condemning authority would effect a taking and the

courts would be making a legislative decision. It is clear that the Supreme Court of Missouri was well aware of its limitations and the scope of its judicial authority when Rule 86.06 was drafted.

Petitioner has presented no factual basis before any court upon which they could find a taking, de jure or de facto, has occurred which violates his rights under either the 5th or 14th Amendments to the Constitution of the United States. There are several issues which remain and are yet to be litigated in the state courts. The allegations as they have been presented to this Court in the Petition are not ripe for review and Petitioner should be directed to exhaust the state remedies available.

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THE HONORABLE HARRY STUSSIE
Respondent.

**BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI**

On behalf of the Honorable Harry Stussie, Respondent, the Missouri Highway and Transportation Commission respectfully responds with its Brief in Opposition to Petitioner's Writ of Certiorari.

STATEMENT OF THE CASE

Respondent agrees with the facts of the case and the chronology of the case as set forth in the Petition for Writ of Certiorari. However, exception is taken to any legal conclusions presented therein.

The basic steps in condemnation proceedings under Missouri law as provided in Section 523.040 RSMo. 1986 and Missouri Supreme Court Rule 86.06 [Pet. App. D] are as follows:

1. Condemning authority files a petition;
2. Court enters an order condemning the land;
3. Court appoints three disinterested freeholders to assess the damages;
4. Commissioners' awards are recorded with Recorder of Deeds;
5. Either or both parties request a trial by filing exceptions;
6. Condemning authority may or may not pay the award into the Court at its election;
7. Prior to jury trial, condemning authority may not take possession until Commissioners' Award is paid into Court;
8. Ultimate jury trial on amount of damages and all appeals therefrom exhausted;
9. Amount of final judgment on verdict paid.

Respondent would direct the Court's attention to the facts wherein any and all action by the condemning authority has only been in the condemnation suit up to the point of filing exceptions. The Missouri Highway and Transportation Commission has not restricted the Petitioner's use of his property, nor is the Petitioner restrained in any manner from selling his property, therefore, no taking has been effected.

Additionally, Petitioner colors Rule 86.06 as an "amendment" to Section 523.040 RSMo. [Petition p. 5]. The Court of Appeals did not apply the rule to the statute. What they did was to find that the rule supersedes the statute and sets forth the correct procedures for the court's actions [Pet. App. A].

REASONS FOR DENYING THE PETITION

Before proceeding to the points raised by Petitioner, Respondent requests the Petition for Writ of Certiorari be denied as the case as it stands in the state courts has not achieved finality in any of the aspects required by the United States Supreme Court in order to review state condemnation proceedings.

In *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), this Court, reaffirming earlier decisions held state court actions are not reviewable until there has been litigation not only on whether there is a taking, but additionally on the payment of just compensation.

Ever since this court's decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37 S.Ct. 295, 61 L.Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127, 65 S.Ct. 1480, 89 L.Ed. 2092 (1945). This is because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163, 94 S.Ct. 407, 412, 38 L.Ed.2d 379 (1973).

Id. at 632, 633

In a more recent decision, the U.S. Supreme Court, following the *San Diego* case and other prior decisions held that no finality existed in earlier cases where the "factual disputes yet to be resolved by State authorities might still lead to the conclusion that no taking has occurred . . . consideration of the remedial question in those circumstances, . . . would be premature." *First English Evangelical Lutheran Church of Glendale*

v. *County of Los Angeles, California*, 482 U.S. 304, 311, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Although the Supreme Court of Missouri did not expressly determine through the decision of the Court of Appeals that no taking has occurred, it was implied in the decision denying payment of the Commissioners' Award. [Pet. App. A p. A-2] Such denial implied that no taking has occurred which deserves just compensation and they expressly held that there was no final assessment upon which they could force execution. There are still issues to be resolved in the state courts which may yield additional Federal questions.

a. AVAILABLE STATE REMEDY

Petitioner is requesting the U.S. Supreme Court to determine that there has been a temporary taking or damaging of his property for which he deserves compensation under the guidelines of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, 482 U.S. 304, 311, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Respondent recognizes that under certain situations this Court may consider appropriate the payment of compensation for temporary takings. See *First English Evangelical, supra*. This issue however, is not before the Court in this appeal. Such an argument is only appropriate in a separate action of inverse condemnation as any payment required of the condemning authority in the present suit would effectuate a permanent taking.

In Missouri, an action in inverse condemnation is not specifically provided as a remedy by statute. Missouri courts however, have long recognized that the right to bring such a suit is inherent by virtue of the constitutional prohibition of taking property without just compensation. *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775, 777 (Mo. App. 1984); *Harris v. Missouri Department of Conservation*, 755 S.W.2d 726, 729 (Mo. App. 1988). Petitioner has never presented any facts before the state courts of Missouri which would allow those courts to determine factually and legally if Petitioner has such a claim. Therefore, this issue is not properly before this Court and Respondent suggests that accepting the Petition for Writ of Certiorari would not be appropriate as Petitioner has not yet exhausted his available state remedies.

b. NO CONSTITUTIONAL TAKING

At present, this case has exceptions pending a jury trial on the amount of just compensation. These are the statutory and court procedures set forth which ensure the landowner compensation for land taken. Chapter 523 RSMo. and Supreme Court Rule 86. [Pet. App. D p. D-3 - D-5] In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) the U.S. Supreme Court held that the Fifth Amendment does not require "that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' " exist at the time of the taking. Id. at 194, quoting from *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 42 L.Ed.2d 3201 (1974), quoting *Cherokee Nation v. Southern Kansas Railroad Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 34 L.Ed. 295 (1890). The U.S. Supreme Court continued by holding the following:

If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation The Constitution is satisfied by the provision of meaningful postdeprivation process. Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless or until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, 468 U.S. 517, 532, n. 12, 104 S.Ct. 3194, 3203, n. 12, 82 L.Ed.2d 393 (1984). Likewise, because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Id. at 195. This language was very recently affirmed by the U.S. Supreme Court in *J. Paul Presault, et ux. v. Interstate Commerce Commission et al.*, 494 U.S. ___, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990).

The Petition for Writ of Certiorari is premised on the Constitutional right of the property owner to receive just compensation for property that is taken or damaged by the government. (Missouri Constitution, Article 1, Section 26.) [Pet. App. D] Respondent does not argue with this basic premise; however, Petitioner fails to present factual allegations sufficient to find that his property has been taken or damaged. Petitioner argues that the institution of condemnation proceedings which are to the point where exceptions to the Commissioners' Award have been filed is equal to a taking. The argument is that the notice of such proceedings filed with the Recorder of Deeds rises to the level of a taking as it places potential purchasers of the property on notice of the proceedings. This same argument was presented in *Government of Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495 (1960), where the defendants claimed an uncompensated taking.

"The reasoning seems to be that the very filing of this suit interferes with the normal freedom of an owner to use and dispose of his property. But such interference is inherent in all condemnation proceedings. No case has been cited or found which supports the view that the condemnation itself constitutes a taking. The Court finds no merit in it."

Id. at 498.

Such a recording with the Recorder of Deeds does not render petitioners property inalienable. Petitioner claims he has no "practical ability" to dispose of his property [Petition p. 7], but in fact, there has been no evidence presented wherein Petitioner has exhibited any inability or deterrence in selling his property because of the condemnation suit. Legally he may sell his entire property and the new owner may be substituted as a party to the condemnation suit. Also, Missouri Highway and Transportation Commission and the Court through its Order of Condemnation and the subsequent recording of the Commissioners' Award have placed no restrictions on Petitioner's use of the land. He may improve it or use it in any manner which merely subjects the condemnor to the potential of paying more damages as the date of value under Missouri law will be the date of the trial unless the property is taken prior to trial. This is a risk the

condemnor may wish to take and the United States Supreme Court has found this to be a legitimate interest enjoyed by condemning authorities.

Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statute takes place upon the payment of the money award by the condemnor... Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to the acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. "The owner is protected by the rule that title does not pass until compensation has been ascertained and paid . . ." A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

Danforth v. United States, 308 U.S. 271, 184 - 285, 60 S.Ct. 231, 84 L.Ed. 240, quoting from *Hanson Lumber Co. v. United States*, 261 U.S. 581, 587, 43 S.Ct. 442, 67 L.Ed. 809.

The State of Missouri has taken no overt actions which rise to the level of a taking including any physical invasion or possession of said property. The particular parcel in question has not been made part of any contract for the project in question for the very reasons pronounced in *Danforth*, supra, nor has Roth alleged that any such action have been taken by the State. "Whether property has been taken for a public use so as to require just compensation is determined by the character of the invasion, not by the amount of damage suffered." *Woodland Market Realty Company v. City of Cleveland*, 426 F.2d 955 (1970); citing *United States v. Cress*, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917).

Again, Petitioner has not presented any facts upon which a Court could find a taking at this time. Petitioner cannot contest the adequacy of the State's condemnation proceedings as to whether they fail to provide just compensation for a taking. Missouri law provides the right to a trial by jury for the landowner on the issue of just compensation and all other procedural steps enumerated in the statutes and rules have remained unchallenged and unchanged. The Missouri Supreme Court Rule 86.06 does not deny landowners right of just compensation. It merely limits the Court's authority to enforce the payment of compensation until such time as the Court can find an actual taking has occurred. In Missouri a taking is not until the Commissioners' Award is paid or until such time as the verdict becomes final which is not until all available procedures have been exhausted. *North Kansas City School District v. J.A. Peterson-Renner, Inc.*, 369 S.W.2d 159 (Mo. 1963), citing *State ex rel. Hilleman v. Fort*, 180 Mo. 97, 79 S.W. 167 (1904), *State ex rel. State Highway Commission v. Deutschman*, 346 Mo. 755, 142 S.W.2d 1025 (1940), *Washington University Medical Center Redevelopment Corporation v. See*, 654 S.W.2d 192 (Mo. App. 1983).

c. MISSOURI SUPREME COURT RULE 86.06 IS WITHIN THE SCOPE OF THE JUDICIARIES AUTHORITY

The Missouri Court of Appeals, Eastern District, directly decided in the opinion of *State ex rel. Behle, et al. Exceptions of Donald Roth v. Stussie*, 793 S.W.2d 567 (Mo. App. 1990), [Pet. App. A] that Missouri Supreme Court Rule 86.06 supersedes Section 523.040 Missouri Revised Statute by virtue of Rule 41.02 which directs that when the rules and statutes are in conflict, the rules are controlling [Pet. App. D]. This decision was appealed to the Missouri Supreme Court which denied transfer [Pet. App. A]. The pertinent difference between Rule 86.06 and Section 523.020 RSMo. is additional language in the Rule:

In Missouri Supreme Court Rule 86.06:

... upon failure to pay the assessmentforesaid, *within 10 days after it becomes final*, . . . the Court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, . . . (emphasis added)

In Section 523.040 Revised Missouri Statutes:

. . . and upon failure to pay the assessment, aforesaid, the court may, upon motion and notice by the part entitled to such damages, enforce the payment of the same by execution.

Petitioner's contention is that the language requiring finality of the assessed value is an attempt by the Supreme Court to alter a substantive right and to change the legislative intent of the statutory condemnation scheme.

There are two key phrases Petitioner chooses to gloss over which are identical in both Rule 86.06 and Section 523.040 RSMo. First is that "the Court *may* upon motion" which specifically implies that the motion is subject to judicial review and is discretionary based on the facts presented. Petitioner misrepresents to this Court that there is case law in Missouri which holds that the word "may" in this statute must read as "shall" *State ex rel. Holladay v. Withrow*, 24 S.W. 638 (Mo. 1891). Respondent would note that factually Holladay varied greatly from the present case and *State ex rel. Behle, supra*, held that the language in Holladay was not controlling case law in Missouri [Pet. App. A].

Additionally the remedy found in the Rule and the statute is for the courts to enforce payment by "execution." Execution is not an available remedy until there is a final judgment on which such remedy may be invoked. It was clearly then the intent of the legislature that finality exist before the Court enforce payment by the condemning authority. The language of Rule 86.06 is not an attempt to fill an omission, but is redundant of the original language of the statute.

It is exactly through the phrase in contention that the Supreme Court of Missouri acknowledges its limitations based on the separation of powers doctrine. Enforcing payment of the award, if there is no prior taking and before the assessment is final, would in effect be a judicial taking and such actions would be commensurate to enacting a legislative function by the courts. *Howell Plaza, Inc. v. State Highway Commission*, 226 N.W.2d 185 (Wi. 1975). Payment of the award constitutes a permanent taking by the condemning authority and the courts cannot force such actions.

If Petitioner's suggestion that the Court should enforce payment of the Commissioners' Award as per Section 523.040 RSMo. were accepted, that would truly be a breach of the separation of powers doctrine as such actions by the Court would force the government to take the property, a function which belongs solely to the legislature. The government or condemning authority must be allowed to control the decision making process in condemnation actions. This does not mean that its actions are not subject to judicial review, but without a factual basis which constitutes a prior taking, the courts cannot force payment of the award.

The taking in this process [condemnation] is accomplished when payment of the award is made, and until then, the government may discontinue or abandon its effort. The award is no more than an offer subject to acceptance by the government, and gives it the opportunity to determine whether the valuation fixed is within its resources or acceptable. In other words, condemnation is a means by which the government may find out what any piece of property will cost. No title passes until the compensation is paid.

United States v. Certain Lands in the Town of Highlands, Orange County, N.Y., 46 F.Supp. 386 (1942) citing *Danforth v. United States*, 308 U.S. 271, 284, 60 S.Ct. 231, 84 L.Ed. 240; *Barnidge v. United States*, 8 Cir., 101 F.2d 295, 298.

The decision of whether private property should be taken for public benefits is clearly a function of the legislative, its agent, or as in this case, an agency deriving the authority from Article IV, Section 29 and Section 30 of the Constitution of Missouri; Missouri Supreme Court Rule 86; and Chapter 523, Revised Missouri Statutes, 1986. This was recently reaffirmed by the U.S. Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, 482 U.S. 304, 311, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

In *Trager v. Peabody Redevelopment Authority*, 367 F.Supp. 1000 (1973), the District Court held that

Due process for individuals is provided in the determination of how much each individual should be compensated for his par-

ticular piece of property. This determination is adjudicatory and each owner is entitled to his day in court.

Id. at 1002, citing *United States v. Cormack*, 329 U.S. 230, 247, 67 S.Ct. 252, 91 L.Ed. 209 (1946).

Courts are clearly an integral part of the condemnation process. The amount of just compensation to be paid is within the discretion of the judiciary. It is also the function of the Courts to determine from the facts, whether a taking has occurred for which compensation is due. Rule 86.06 is despositive of the fact that the Supreme Court of Missouri knows the Court may not interfere until a taking has occurred, which is either when the money is paid or a trial on the exceptions and all available processes after a verdict have been exhausted. *North Kansas City School District v. J.A. Peterson-Renner, Inc.*, 369 S.W.2d 159 (Mo. 1963), citing *State ex rel. Hilleman v. Fort*, 180 Mo. 97, 79 S.W. 167 (1904). Then, and only then, may the Court force the government or condemning authority to pay for the land because a taking has occurred.

CONCLUSION

The Supreme Court of Missouri was cognizant of the boundaries of their authority when they drafted Rule 86.06. It is the limitations of their authority that necessitated the finality language. The actions by the Missouri Highway and Transportation Commission are not commensurate to a taking. Petitioner has failed to demonstrate any actions which rise to the level of a taking which would then allow the courts to step in to enforce compensation. The Petition for Writ of Certiorari is without merit in all aspects. There has been no taking, the Supreme Court of Missouri cannot force such a taking and therefore, Rule 86.06 promulgated by that Court has not exceeded that Court's Constitutional authority.

Petitioner has not presented a claim to this Court which rises to the level of a taking sufficient to invoke the Due Process clause of the Fifth and Fourteenth Amendments. The condemning authority cannot be forced by the Courts to take possession of property by paying an

assessment that is equal only to an offer is not the final assessment upon which the Court can enforce execution as prescribed by both the statutory provision of Section 523.040 RSMo. (1986), and the Supreme Court Rule 86.06. Such premature action and intervention by the Courts would be tantamount to a legislative function and certainly in derogation to the separation of powers doctrine. Respondent respectfully requests that for the above stated reasons the Petition for Writ of Certiorari should be denied and Petitioner should be directed to make his claim, should he have one, to the appropriate state court.

Respectfully submitted,

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